

Message Text

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TO AMEMBASSY CANBERRA IMMEDIATE

INFO USMISSION GENEVA

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E.O. 11652: N/A

TAGS: ICRC, PARM, AS

SUBJ: GENEVA CONFERENCE ON LAW OF WAR

REF: (A) GENEVA 1566; (B) CANBERRA 1451 (C) GENEVA 1591

1. DEPT CONCURS THAT ISSUE SET FORTH REF A IS ONE OF MAJOR IMPORTANCE ON WHICH STRONG DEMARCHE IN CANBERRA IS WARRANTED. ACCORDINGLY, EMBASSY REQUESTED TO APPROACH DOFA AT HIGHEST POSSIBLE LEVEL TO CONVEY DEPT'S SERIOUS CONCERN OVER CURRENT AUSTRALIAN POSITION. IN ADDITION TO POINTS SET FORTH REFS A AND C, EMBASSY MAY WISH TO DRAW ON FOLLOWING, DRAFTED BEFORE RECEIPT REF C.

2. DIPLOMATIC CONFERENCE IN GENEVA IS PRESENTLY CONSIDERING TWO DRAFT PROTOCOLS TO THE 1949 GENEVA CONVENTIONS. THE COVERAGE OF THE CONVENTIONS THEMSELVES IS LIMITED TO CONFLICTS ARISING BETWEEN TWO OR MORE OF THE PARTIES

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TO THE CONVENIONS -- THAT IS, IN EFFECT, TO CONFLICTS

OF AN INTERNATIONAL CHARACTER -- BUT THEY DO CONTAIN PROVISION FOR MINIMUM HUMANITARIAN STANDARDS TO BE APPLIED IN CONFLICTS NOT OF AN INTERNATIONAL CHARACTER OCCURING IN THE TERRITORY OF ANY PARTY. THE FIRST DRAFT PROTOCOL NOW UNDER CONSIDERATION IN GENEVA WOULD DEVELOP FURTHER THE PROTECTIONS ACCORDED IN INTERNATIONAL ARMED CONFLICTS, WHILE THE SECOND WOULD DEAL WITH THE PROBLEM

OF NON-INTERNATIONAL CONFLICTS. UNDER BOTH THE 1949 CONVENTIONS AND THE DRAFT PROTOCOLS, THE PROTECTIONS ACCORDED COMBATANTS IN INTERNATIONAL CONFLICTS ARE, OF COURSE, GREATER THAN THOSE ACCORDED PARTICIPANTS IN NON-INTERNATIONAL -- I.E. "CIVIL" -- CONFLICTS. IN PARTICULAR, POW TREATMENT IS ACCORDED ONLY TO THE FORMER, ALTHOUGH THERE ARE BASIC ASSURANCES OF HUMANE TREATMENT FOR THE LATTER.

3. THE INTENT AND EFFECT OF THE PROPOSAL WHICH THE AUSTRALIANS ARE SUPPORTING IS TO DEFINE "WARS OF NATIONAL LIBERATION" AS INTERNATIONAL CONFLICTS, REGARDLESS OF THEIR OBJECTIVE CHARACTER, WITH THE RESULT THAT "NATIONAL LIBERATION" FORCES IN STRICTLY INTERNAL CONFLICTS WOULD BE ENTITLED TO THE MORE ELABORATE PROTECTIONS ACCORDED COMBATANTS IN STANDARD INTERNATIONAL CONFLICT.

4. OUR OBJECTION IS NOT TO THE IDEA OF ACCORDING GUARANTEES OF HUMANE TREATMENT AND OTHER PROTECTIONS TO PARTICIPANTS IN CONFLICTS OF AN INTERNAL OR CIVIL NATURE. INDEED, WE HAVE ENCOURAGED THE DEVELOPMENT OF SUCH PROTECTIONS IN DRAFT PROTOCOL II, WHICH IS INTENDED TO DEAL PRECISELY WITH THIS PROBLEM. WHAT IS DISTURBING ABOUT THE PROPOSAL IS THAT IT WOULD MAKE THE DETERMINATION OF THE PROTECTIONS TO BE ACCORDED A COMBATANT DEPEND ON A POLITICAL JUDGMENT ABOUT THE NATURE OF THE CAUSE FOR WHICH HE WAS FIGHTING. IN OTHER WORDS, IT WOULD RESULT IN MORE FAVORABLE TREATMENT BEING GIVEN TO SOME COMBATANTS (E.G., THOSE ENGAGED IN ARMED STRUGGLE AGAINST "FOREIGN DOMINATION") THAN TO OTHERS SIMILARLY - SITUATED (E.G., ORDINARY ARMED INSURRECTION) SOLELY LIMITED OFFICIAL USE

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BECAUSE THE FORMER ARE FIGHTING FOR A CAUSE CONSIDERED "JUST".

5. THIS RESULT IS TOTALLY INCONSISTENT WITH THE BASIC PREMISE OF THE GENEVA CONVENTIONS, WHICH IS THAT PROTECTIONS ACCORDED COMBATANTS BY THE CONVENTIONS APPLY WITHOUT REGARD TO THE "JUSTNESS" OF THE CAUSE FOR WHICH THEY FIGHT. A CONTRARY APPROACH RESULTS IN TOTAL

BREAKDOWN IN THE HUMANITARIAN PROTECTIONS ACCORDED BY THE CONVENTIONS, SINCE STATES INVOLVED IN ARMED CONFLICT VERY RARELY REGARD ENEMY FORCES AS FIGHTING FOR A "JUST" CAUSE. THUS, WE BELIEVE THAN ANY DISTINCTION AMONG COMBATANTS BASED ON THE CHARACTER OF, OR A JUDGMENT ABOUT, THE POLITICAL NATURE OF THE CAUSE IN WHICH THEY FIGHT THREATENS A COMPLETE BREAKDOWN IN THE EFFECTIVENESS OF HUMANITARIAN PROTECTIONS IN TIME OF WAR.

6. IF GOA FEELS, AS WE DO, THAT THERE IS NEED FOR MORE PROTECTION IN CIVIL CONFLICTS, WAY TO ACHIEVE THIS OBJECTIVE IS TO SUPPORT STRONG PROVISIONS IN DRAFT PROTOCOL II. THIS WOULD RESULT IN PROTECTIONS BEING ACCORDED ON THE BASIS OF THE OBJECTIVE CHARACTER OF A CONFLICT WITHOUT INTRODUCING SUBJECTIVE JUDGMENTS WHICH CAN ONLY DIMINISH THE EFFECTIVENESS OF THE HUMANITARIAN LAW OF ARMED CONFLICT.

7. IN MAKING FOREGOING POINTS, YOU SHOULD MAKE IT CLEAR THAT WE BELIEVE THIS ISSUE GOES BEYOND QUESTION OF SUPPORT FOR VARIOUS LIBERATION MOVEMENTS. WE BELIEVE THAT FOR GOA AND OTHER GOVERNMENTS WHICH ARE CONCERNED ABOUT EFFECTIVE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO PARTICIPATE IN UNDERMINING OF BASIC FOUNDATIONS OF THAT LAW FOR SHORT-TERM POLITICAL GAIN WOULD BE HIGHLY IRRESPONSIBLE. KISSINGER

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